While the defense bar will certainly argue that *Bullcoming v. New Mexico*, No. 09-10876 (U.S. June 23, 2011), decided yesterday, prohibits an expert witness from offering a scientific opinion (such as cause of death, a DNA analysis, or the chemical composition of drugs) where another expert performed the underlying tests, I don't believe this to be the case. The SJC has long been applying the rule set forth in *Bullcoming*. Accordingly, I don't think we need to end the practice of providing substitute experts, but the State Police Crime Lab (and the DPH lab) should re-examine and possibly change some of their practices to ensure the admissibility of substitute expert testimony.

Summary of *Bullcoming*

Forensic analyst Curtis Caylor performed an analysis of Bullcoming's blood alcohol content. He wrote a "certificate of analyst" in which stated that "the seal of the sample was received intact and broken in the laboratory," that he had "followed the procedures set out on the reverse of the report," that the "established procedure … had been followed," and that Bullcoming's BAC was 0.21. *Bullcoming*, slip op. at 4-5.

Caylor did not appear at trial because he had "very recently been put on unpaid leave." *Id.* at 5. Instead, Caylor's certificate was introduced into evidence, *as a business record,* through Gerasimos Razatos, a scientist who had neither observed nor reviewed Caylor's analysis. *Id.* at 5-6.

The question presented in *Bullcoming* was the following: "Does the Confrontation Clause permit the prosecution *to introduce a forensic laboratory report containing a testimonial certification* . . . through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification"? *Id.* at 7-8 (emphasis added). Not surprisingly, the Court – in a 5-4 opinion written by Justice Ginsburg and joined by Justices Scalia, Thomas, Sotomayor, and Kagan – held that this practice is indistinguishable from the practice the invalidated in *Melendez-Diaz*. "[T]he analysis who write *reports the that prosecution introduces* must be made available effort confrontation . . . ." *Id.* at 11 (emphasis added). "In short, *when the State elected to introduce Caylor's certification*," Caylor became a witness Bullcoming had the right to confront." *Id.* at 13 (emphasis added).

Justice Sotomayor, the fifth member of the majority, wrote a separate concurring opinion "to emphasize the limited reach of the Court's opinion." *Bullcoming*, Sotomayor, J., concurring, at 1. She wrote, "[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 6. "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Id.* In addition, "[T]his is not a case in which the person testifying is a supervisor,

reviewer, or someone with a personal, albeit limited, connection to the scientific test as issue." *Id.* at 4.

Bullcoming is consistent with Massachusetts law and our substituted expert practice

As my choice of italicized language and quotations from the concurring opinion suggest, what *Bullcoming* prohibits is the introduction of an analyst's testimonial hearsay when that analyst is not present for cross-examination. This has long been the rule in Massachusetts. The SJC's decisions under *Melendez-Diaz*, and even prior to it, have held that the reports, certifications, and observations of experts who do not appear at trial are *inadmissible* when a different expert testifies. "[I]f a Commonwealth expert on direct examination were to testify to the conclusion or opinion of a second, nontestifying expert, that conclusion or opinion would be inadmissible hearsay." *Commonwealth v. Barbosa*, 457 Mass. 773, 784 (2010). Clearly, under SJC precedents, the error in *Bullcoming* would not have occurred: Razatos would not have been permitted to introduce Caylor's certificate.

But Massachusetts law does allow experts to offer opinion evidence when they did not perform the underlying tests, so long as the five foundational requirements of expert testimony are met, *see Commonwealth v. Barbosa*, 457 Mass. 773, 783 (2010), and the testimonial statements of the experts who did perform the tests are not introduced into evidence. "Where the Commonwealth calls an expert witness, direct examination is limited to the expert's opinion and matters of which the expert has personal knowledge, such as her training and experience, and the protocols generally accepted in her field of expertise. *Id.* at 785. *See also Commonwealth v. McCowen*, 458 Mass. 461,480-81 (2010) ("observations, findings, and opinions of Dr. Weiner [who conducted autopsy but did not testify] reflected in his notes and reports" inadmissible as testimonial hearsay, but "Dr. Nields [who was present] properly could have testified to his own opinion . . . based on his forensic expertise as a medical examiner and his review of Dr. Weiner's notes and reports"); *Commonwealth v. Nardi*, 452 Mass. 379, 388, 391 (2008) (pre-*Melendez-Diaz*) ("Dr. McDonough's opinion regarding the cause of death, based principally on an autopsy which he neither performed nor attended," admissible because he "testified to his own expert opinion, and did so based on a permissible foundation," but Dr. McDonough's "testimony on direct examination improperly included reference to many of the findings contained in Dr. Weiner's report"); *Commonwealth v. Avila*, 454 Mass. 744, 762-63 (2009) (applying and approving *Nardi* approach in light of *Melendez-Diaz*).

As Justice Sotomayor pointed out, quoting from *Melendez-Diaz*, it is not necessary for every witness to the chain of custody and testing process to appear at trial: "[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence." *Bullcoming*, Sotomayor, J., concurring, at 3 n.2. Nonetheless, the labs may want to institute the practice, if it

is not the practice already, of having supervisors or others who will be called upon to appear in court observe or review part of the testing process of other analysts. This will enable the Commonwealth to negate suggestions in the *Bullcoming* decision that it was the surrogate expert's lack of direct observation that make Caylor's report inadmissible. *Bullcoming*, slip op. at 16 (suggesting Razatos cold not testify "to the results of a test he did not conduct or observe"); Sotomayor, J., concurring, at 4 ("It would be a different case if . . . a supervisor who observed an analyst conducting a test testified about the results or a report about such results.").